ment is that, since the Act requires the Commission to establish procedures for stations to elect between must carry and retransmission consent, Congress only intended for retransmission consent to apply to those cable systems for which an election must be made. Since the Act does not require the Commission to adopt regulations governing retransmission consent with respect to stations outside a cable system's ADI, Viacom suggests that Congress must not have intended to address carriage of such stations.

Viacom itself identifies why its argument flies in the face of the Act, although it attempts to distinguish all contrary language. Comments of Viacom at 26-32. Its efforts fail. First, section 325(b) explicitly requires retransmission consent for the use of the signal "of a broadcasting station," a broad description of the stations entitled to exercise control over their signals. If Congress had intended to limit retransmission consent to stations otherwise entitled to must carry, it created in the Act a defined term — "local commercial television station" — to describe stations which have must carry rights. It could have used that term, a choice which would have simplified the drafting of section 325 since the exclusions for noncommercial stations, superstations, and satellite dish reception of certain signals would then have been unnecessary. That Congress chose instead to use the broadest possible language describing a broadcast station shows that its intentions were not limited.

Further, section 614(a), which makes clear that cable systems are not restricted to carrying only the signals of must carry stations, explicitly subjects those "may carry" rights of cable systems to section 325(b). In other words, non-must carry

stations may be carried if the cable system obtains retransmission consent. Viacom argues that the "may carry" provisions also extend only to local signals, and that carriage of signals outside of an ADI is not addressed in section 614. The Senate report is to the contrary. It states: "While requiring carriage of a complement of qualified local broadcast signals, this section also provides that local operators may, in their discretion, carry any additional broadcast television stations."[58/] This passage clearly uses the term "local" with respect to signals which are subject to must carry, but refers to "any additional" signal that may be carried. Certainly, the Senate Committee was aware that cable systems do carry signals from outside their local service areas.

The third indicator of Congress' intent that retransmission consent applies to all signals are the exemptions in section 325(b)(2). Although Viacom suggests that they were only placed in the Act as part of Congress' special regard for satellite-delivered signals, this argument is farfetched. The specific provisions in the Act which address satellite-delivered signals each occur where the particular circumstances of those signals required special provisions; no general policy regarding satellite-delivered television signals can be discerned from the Act or its legislative history.

Viacom's construction of the Act would make these exclusions in section 325 and the reference to section 325 in section 614(a) superfluous. It is a fundamental canon of statutory construction that statutes should not be construed to leave superfluous language. The more natural construction of the Act, one that follows the plain

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58/ S. REP. No. 92, 102d Cong., 2d Sess. 84 (1991).

language of the statute, is one which applies section 325 to carriage of any broadcast signal, whether from a station within the cable system's television market or otherwise. That is also consistent with Congress' intention to reverse the FCC's decision excluding cable systems from the ambit of section 325, a provision which was never limited to local signals. *See supra* pp. 37-38. Viacom's strained effort to obtain a wholesale exception to the Cable Act must be denied.

Program Exhibition Rights and Retransmission Consent

Two generic issues were raised in response to the FCC's inquiry regarding the nexus between program exhibition rights and retransmission consent. The first issue is whether or to what extent program or network contracts can control the rights of broadcasters to exercise retransmission consent. The second issue is, assuming retransmission rights can be affected by the terms of program or network contracts, can or should the Commission impose a "prior consent" requirement as a means of enforcing such terms.

With respect to the first issue, the vast majority of comments shared NAB's view[59/] that the retransmission consent rights provided to broadcasters in section 325(b) to control the use of their *signals* is totally separate and distinct from the copyright interests of individual program suppliers whose works are included in the signal. For agreements between broadcasters and multichannel video programming distributors, the statutory scheme is simple. Broadcasters derive the rights to control the use of their *signal*, in which copyright owners have no interest, under the

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59/ Comments of NAB at pp. 51-54.

Communications Act. Copyright owners of *programs* that are included in a broadcaster's signal that is retransmitted derive their rights from the Section 111 of the Copyright Act or other applicable provisions of the copyright laws.

The application of this signal/program distinction to a typical program contract is relatively straightforward. For example, language in a program contract which prohibits or restricts the right of a station to grant to another the right to retransmit the program simply does not apply in the broadcast/cable context. A broadcaster with such a provision in one of its program contracts that grants retransmission consent under the Act to a cable operator would not violate the terms of the contract because it is not granting consent to retransmit the *program*, but rather to retransmit its *signal*. The interests of the copyright holder of the program are governed by the compulsory license which does not allow copyright owners with any control over the retransmission of their programs by cable systems.

This scheme does not, as some have suggested, result in an inequitable windfall for the broadcaster. It is clearly anticipated that any remuneration a broadcaster might receive from granting retransmission consent for its signal will be taken into account by program suppliers, be they syndicators or networks, in their negotiations with individual stations.[60/]

An interpretation of section 325(b) of the Act which would allow the contractual provisions of a single program supplier to defeat a station's ability to assert

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[60/] Moreover, program suppliers not wishing their copyrighted works to be subject to the retransmission consent/compulsory license scheme are free to bypass that process and deal directly with cable operators.

retransmission consent with respect to its entire signal to every multichannel video programmer would render meaningless Congress' clear intent "careful[ly] to distinguish between the authority granted broadcasters under the new section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interest of copyright holders in the programming contained on the signal."[61/] Such an interpretation would also directly contradict the mandate of section 325(b)(6) that: "[n]othing in this section shall be construed as modifying the compulsory copyright license established in Section 111 of Title 17 United States Code . . .", in that one such contractual provision prohibiting retransmission consent of a program would effectively preclude a station from being carried anywhere as a distant signal because the station could not grant the necessary consent to any distant cable system to carry the station.[62/] As noted by the Copyright Office ". . . a requirement that broadcasters first obtain affirmative permission to retransmission consent of the programming before exercising such consent to the signal would frustrate the . . . [retransmission] right by holding it hostage to the whim of copyright holders."[63/]

61/ S. REP. No. 92, 102d Cong., 1st Sess. 36 (1991).

62/ That such an interpretation should be suggested by a vertically integrated company like Time Warner is particularly odious, in that it would allow Time Warner the program supplier to insert a contractual provision in a program contract with a local broadcaster that would preclude the broadcaster from exercising its retransmission consent rights on Time Warner's local cable system.

63/ Copyright Office Comments at 15.

That MPAA reiterates its opposition to retransmission consent and the views it expressed strenuously and forcefully to Congress that a television signal has no value except as a carrier of programs is not surprising.[64] That the Copyright Office, a minion of Congress, should continue publicly to espouse the view that retransmission consent and the compulsory license are incompatible, and that "although [Congress in] the Act *professes* not to impact the relationships between programmers and broadcasters, there is no practical way to separate the regulation of signal carriage from that of program carriage"[65] is extraordinary. Equally incredible is the Copyright Office's continuing to advise the Commission that "retransmission consent effectively equates to copyright exclusivity . . . [and] [t]he Act creates the equivalent of intellectual property rights for the benefit of broadcasters in their programming . . .",[66] when Congress has specifically stated that this is not so.[67] In essence, the Copyright Office appears to be saying that Congress simply did not know what it was doing, despite the fact that Congress considered and rejected the Copyright Office's views in adopting the Act.[68]

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[64] MPAA graciously acknowledges that Congress did not agree and adopted retransmission consent despite MPAA's perceived "flaws." MPAA Comments at 2.

[65] Copyright Office Comments at 8 (emphasis added).

[66] *Id.*

[67] 47 USC § 325(b)(6).

[68] The views of the Copyright Office presented to Congress on retransmission consent were somewhat malleable. Representatives of that Office participated in drafting language on the Senate side that ultimately was incorporated in

(continued...)

In its zeal to continue to wage its campaign against retransmission consent on behalf of non-broadcast copyright owners, the Copyright Office appears blithely unconcerned about the inconsistency of its positions. For example, the Office expresses considerable concern that retransmission consent is at odds with the compulsory license and will adversely affect signal availability because it effectively permits broadcasters to deny access to their signals by withholding consent.[69/] But the Office has no problem with espousing the view that copyright owners may, by contract, supersede a broadcaster's retransmission rights in its signal, thereby effectively permitting a copyright owner to deny access to the signal to all distant cable systems and forcing the broadcaster only to elect must carry in its local market.[70/]

Finally, and significantly, the Copyright Office's interpretation that contractual provisions currently can supersede a station's ability to grant retransmission consent appears at odds with the views of the Chairman of the House Copyright Subcommittee who recently introduced legislation that would make a television station authorizing the secondary transmission of a copyrighted work without the express written consent

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[68/](...continued)
Section 325(b)(6) to assure that retransmission consent and copyright would be compatible. When cable legislation including retransmission consent reached the House and was opposed by certain members of the Judiciary Committee, language which the Copyright Office appeared to find acceptable in the Senate suddenly became inadequate.

[69/] Copyright Office Comments at 9.

[70/] *Id.* at 14.

of the copyright owner a copyright infringer.[71/] Were the Copyright Office's interpretation correct, presumably this legislation would be superfluous.

While the Copyright Office's views in this area would normally be entitled to some deference, where, as here, it simply ignores what Congress has done, and continues to advocate its own preferences as to what it thinks Congress should have done, no particular weight should be ascribed to its opinions.

Assuming *arguendo* that program contract language could supersede a station's right to grant retransmission consent, the second major issue addressed in the comments is whether the Commission can or should serve as a vehicle to enforce such language. On this issue, with the possible exception of Time Warner and Viacom, there appears to be unanimous agreement that the Commission should not embroil itself in copyright and contract interpretation issues, but should leave such issues to the courts. Accordingly, while it would be desirable for the Commission to stipulate in its regulations that a station's retransmission rights in its signal cannot be superseded by contractual language relating to retransmission of particular programs within the signal, at worst the Commission's rules should simply not address the issue.

Conclusion

The must carry and retransmission consent provisions of the Cable Act formed a central part of Congress' goal of changing the role of cable television in the video distribution system. The Commission should approach the task of developing rules to implement them in the spirit Congress intended — to change the environment in

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71/ H.R. 12, 103d Cong. 1st Sess. (1993).

which broadcast signals are used by cable systems and other video distributors. The Commission should avoid the invitations of parties who want the Commission to interpret the act in a narrow fashion or in ways directly contrary to the language of the Act and to Congress' intent. It should also only deal with the issues needed to commence implementation of the Act, and leave speculative concerns about unintended consequences to be evaluated after practical experience demonstrates that further rules are necessary.

Respectfully submitted,

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January 19, 1993

APPENDIX A

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

JUL 21 1987

IN REPLY REFER TO

4620-RP

James M. Smith, Esq.
Pierson, Ball & Dowd
1200 18th Street, N.W.
Washington, DC 20036

In re: Request of Clarification of Sections 76.56(c) and (d) of the Commission's Rules.

Dear Mr. Smith:

This is in response to your letter of June 23, 1987 requesting a clarification of Sections 76.56(c) and (d) of the Commission's recently adopted must carry rules. Initially, we wish to note that our ruling today is informal since specific parties which may be directly affected by the outcome of the posited question have not been served with a copy of your letter. Specifically you ask, in reference to the above rule sections, whether an otherwise qualified must carry station may use a translator station to provide the required high quality picture to a cable television system.

Section 76.56(d) of the Commission's must carry rules specifically states that an otherwise qualified station may bear any costs associated with the delivery of a good quality signal. Further, at paragraph 149 of the Report and Order in MM Docket No. 85-349, 1 FCC Rcd 864 (1986), recon. FCC 87-105 (released May 1, 1987), the Commission stated that "[b]roadcast stations also will be permitted to deliver their base band video/audio signal directly to cable systems via alternative means such as a landline or microwave facility." The provision of a high quality signal via a translator station would appear to fall within the category of delivering a signal "via alternative means." Therefore, if such action resulted in the delivery of a high quality signal to the cable system's headend, the television station would (assuming the other criteria are met) be classified as a qualified must carry signal.

Sincerely,

s/WILLIAM H. JOHNSON

William H. Johnson
Acting Chief
Mass Media Bureau